



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

April 26, 1976

MEMORANDUM

SUBJECT: Enforcement of NSPS Requirements

TO: Jay Sargent, Chief  
Legal Branch, Enforcement Division  
Region IV

FROM: Edward Reich, Chief, Enforcement Proceedings Branch *E Reich*  
Division of Stationary Source Enforcement

This is in response to your inquiry concerning the steam generator subject to NSPS at the Monsanto Chemical Company in Decatur, Alabama.

As we understand the facts, Monsanto plans to use low sulfur coal to achieve compliance with the emission limitation provision of 40 CFR 860.43. However, Monsanto has asked to burn a high sulfur fuel for 180 days after start-up, but before the performance test required by 40 CFR 860.8. During this period, the company will be operating at less than the maximum production rate. Your inquiry concerns what enforcement options, if any, the region can pursue to prevent Monsanto from burning a higher sulfur coal after start-up but before the performance test required by 40 CFR 860.8.

The above circumstances should not preclude the regional office from using whatever enforcement mechanism it feels will insure compliance with NSPS requirements from the commencement of operation. Enforcement options include an administrative order to burn complying low sulfur coal or, if appropriate, a civil or criminal action.

The rationale for this approach is as follows. Section 111(e) of the Clean Air Act provides that it shall be unlawful to operate a new source in violation of standards of performance applicable to such source. Also, 40 CFR 860.8(a) provides:

860.8 Performance tests.

- (a) Within 60 days after achieving the maximum production rate at which the affected facility will be

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operated, but not later than 180 days after initial start-up of such facility and at such other times as may be required by the Administrator under section 114 of the Act,\* the owner or operator of such facility shall conduct performance test(s) and furnish the Administrator a written report of the results of such performance test(s). (Emphasis added.)

The intent of 40 CFR §60.8 was to provide a short period of time after start-up during which an affected facility could adjust and fine tune control equipment before the performance test. This provision merely sets forth in regulatory form, those circumstances where EPA will exercise its enforcement discretion to allow for reasonable shake-down time. This forbearance on EPA's part is consistent with the statutory mandate of requiring use of best adequately demonstrated control technology (considering costs) on new sources upon start-up and at the same time provides a reasonable period for affected facilities to fine tune control equipment. However, §60.8 was never meant to imply that, prior to the performance tests, a grace period exists during which a source need make no attempt to achieve compliance with NSPS requirements. In fact, 40 CFR §60.11(d) clearly outlines an affected facility's obligation to minimize emissions at all times:

#### §60.11 Compliance with standards and maintenance requirements.

\* \* \*

(d) At all times, including periods of start-up, shut-down, and malfunction, owners and operators shall, to the extent practicable, maintain and operate any affected facility including associated air pollution control equipment in a manner consistent with good air pollution control practice for minimizing emissions. Determination of whether acceptable operating and maintenance procedures are being used will be based on information available to the Administrator which may include, but is not limited to, monitoring results, opacity observations, review of operating and maintenance procedures, and inspection of the source.

In sum, the 180-day period in 40 CFR §60.8 is not a grace period during which a source need make no attempt to achieve compliance with NSPS. Rather, it is a shake-down period for control equipment which may (as in the present case) be unnecessary. When such a situation arises, the regional office should pursue whatever enforcement mechanism it feels will insure expeditious compliance with NSPS requirements.

Since litigation is certainly a possibility in this case, we would suggest that you communicate to Monsanto EPA's interpretation of its regulations as soon as possible to lay a firm basis for whatever follow-up litigation may be necessary.

\* Under this provision the Administrator could, presumably, require a performance test even earlier than would otherwise be required under the regulations.